



TRAUMA-INFORMED  
PROSECUTOR PROJECT



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## 2021 Arizona Virtual STARK Prosecutor Symposium

# Cross-Examination of the Digital Forensics Defense

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Distributed by:

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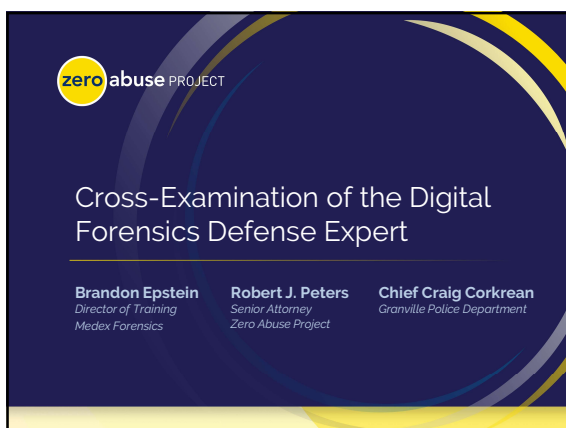
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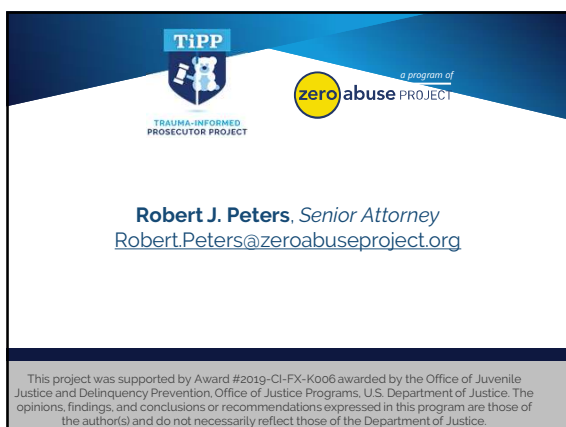
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### Disclaimer

- The following is not intended to constitute legal advice.
- Terms and legal concepts include a broad range of national sources. Always consult your local prosecutor or attorney for guidance.
- Credit to Assistant State Attorney Justin Griffis and Zero Abuse Project team members for significant content and research contributions.



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### Taking it Home

Ideas	Applications



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### Agenda

- Trial Preparation Considerations
- Areas of Cross-Examination
- Reviewing the Forensic Report
- Cross-Examination Examples



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### Cross-Examination of Defense Experts



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### Digital Forensics Defense Experts

- This is going to be difficult.
- Have a game plan
  - What are you trying to accomplish through cross-examination?
  - Are you attacking a conclusion? Their lack of credentials? Improper investigation methods? The tools they used?
  - The hardest part of any cross: knowing when to stop questioning and sit down

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### Do You Have Their CV?

- Significant opportunity for attacks
  - Do they attend regular trainings?
  - Do they hold any certifications?
  - Do they have any training/certifications in the area they are testifying about?
    - Confirm
- Frye/Daubert hearing an option?
  - You may very well be able to exclude them if so
    - Testifying outside an area they hold expertise in
    - Not providing information that can assist the Jury
    - Not following accepted testing methodology / protocols

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## Ethics

- Examine the ethical guidelines pertaining to the profession of the expert
- Are you familiar with the ethical guidelines of \_\_\_\_\_?
- You recognize the rules require you to be competent in the areas you are practicing in or are otherwise offering your expertise?
- These rules also require you to undertake ongoing efforts to develop and maintain your competence?
- In this case, you are offering your "expertise" on the subject of \_\_\_\_\_?
- And yet...?



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## The Traditional Questions

- Where does the majority of their revenue come from?
- Is their work primarily civil, or criminal?
- How much are they being paid in this case?
  - Yes, you can ask this.
- Is your work peer reviewed?
  - (Is your expert's? Most law enforcement officers have a supervisor review and sign off)



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## The Money Questions

- All defense experts are used to this, but it can still be effective to ask them who is paying them and how much.
- Point out that if they did not provide "helpful" information to defense counsel, their fees would not be as high (not as many hours, etc)
- How often do they testify each year? What percentage of their annual income is derived from these consultations?
- If they declined to speak with you, the prosecutor or your FI, zing them with—is that because you wouldn't be paid for that consultation?
- Are they on the Child Abuse Defense & Resource website? ([www.falseallegation.org](http://www.falseallegation.org))? They market themselves to defense attorneys? Count on word of mouth as to your effectiveness?



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## Periodicals and Publications

- Do they have current knowledge of the literature / requirements of CFEs?
- Caselaw on ability to cross-examine when expert lacks knowledge/familiarity
  - Jordan v. State, 694 So.2d 708 (Fla 1997)
  - Chavez v. State, 12 So.3d 199 (Fla 2009)
  - Clare v. Lynch, 220 So.3d 1258 (Fla 1997)



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## Did They Generate a Report? Notes?

- Obtain these
- The State is often compelled to provide notes, especially if not reduced to a report, and defense experts should be held to the same standard.
  - Bailey v State 100 So.3d 213 (Fla 3rd DCA 2012)
  - State v Rabin 495 So.2d 257 (Fla 3rd DCA 1986)
- Review defense expert report with state expert
  - What tools did they use?
    - Did they have the correct, most up to date equipment? (Cellebrite Cable)
  - Did they follow protocol?
  - Does the report concur with your examiner's findings? Where?
    - The more, the better. Have the defense expert concede extensive facts, even if you don't perceive them as critical.
  - Where does the report differ?
    - Make sure your examiner can explain the difference.



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## Evaluating a Digital Forensics Report

- Examine the mechanism used to collect the digital evidence
- Does the report provide sufficient details to replicate findings?
- Structure of a digital forensics report
- Does the report establish the tools used and assumptions made by the forensic examiner?
  - Guide for the Bench and Bar on How to Evaluate a Digital Forensics Report," Daniel Garrie and William Spornow



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### Cross on Case Specifics

- Defense experts love to speak in generalities.
  - "too many \_\_\_\_\_", "not enough \_\_\_\_\_"
- With respect to the witness' broad statements, ask for specific examples to support claim (it's a risk—but a small one)
- Ask the witness what the examiner/examination did correctly (win-win question). If the expert can't think of anything, shows bias. If the expert lists some correct things, ask why they are not included in his report? (particularly if he claims neutrality)
- Cross on corroborating evidence, especially if involving (admissible) prior bad acts



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### Cross-Examination Examples



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### **STARR PROSECUTOR SYMPOSIUM**

Stopping Technology-Facilitated Abuse of Rural Kids



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